(3)

Supreme Court, U.S.
FILED
JAN 25 1999
CLERK

No. 98-986

In The

Supreme Court of the United States

October Term, 1998

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

KOLOSSO AUTO SALES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION OF *AMICUS CURIAE* THE STATE OF WISCONSIN

JAMES E. DOYLE
Attorney General

PETER C. ANDERSON*
Assistant Attorney General
State Bar #1009845

Attorneys for *Amicus curiae*
State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9595

*Counsel of Record

22 pp

TABLE OF CONTENTS

Page

STATEMENT 1

A. **Degree of Impairment Resulting from the State's Enactment of a Law Which "regularized a gray area in the [prior] dealership law by creating a specific procedure for resolving disputes over dealers' requests to relocate." Pet-Ap. 9a.** 2

B. **Kolosso's Relocation Request.** 7

C. **The District Court Action.** 7

D. **The Seventh Circuit's Decision.** 8

REASONS FOR DENYING THE PETITION 8

I. **EVEN IF THE SEVENTH CIRCUIT'S DECISION is READ AS HOLDING "THAT A STATE MAY FREELY IMPAIR A CONTRACT WITH *NO* PUBLIC JUSTIFICATION, SO LONG AS THE IMPAIRMENT IS 'SMALL,'" PET. AT (I), THAT HOLDING WOULD BE CONSISENT WITH THIS COURT'S INTERPRETATION OF THE CONTRACT CLAUSE.** 9

II. THE FIRST QUESTION PRESENTED BY THE PETITION IS NOT FRAMED BY THE SEVENTH CIRCUIT'S DECISION. 12

III. THE SEVENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS. MOREOVER, PETITIONER'S PERCEPTION OF THE IMPACT OF THE DECISION IS EXAGGERATED. 17

CONCLUSION 19

CASES

Allied Structural Steel Co. v. Spannaus,
438 U.S. 234 (1978) 9, 11

Energy Reserves Group, Inc. v. Kansas Power & Light Co.,
459 U.S. 400 (1983) 10, 11

Forest Home Dodge, Inc., v. Karns,
29 Wis. 2d 78, 138 N.W.2d 214 (1965) 15

Holiday Inns Franchising, Inc. v. Branstad,
29 F.3d 383 (8th Cir. 1994) 17, 18

Kuhl Motor Co. v. Ford Motor Co.,
270 Wis. 488, 71 N.W.2d 420 (1955), ... 13

McDonald's Corp. v. Nelson,
822 F. Supp. 597 (S.D. Iowa 1993) 17

Nagle Motors v. Volkswagen N. C. Distributor,
51 Wis. 2d 413, 187 N.W.2d 374 (1971) 13

New Motor Vehicle Bd. of Cal. V. Orrin W. Fox Co.,
439 U.S. 96 (1978) 15

United States Trust Co. of New York v. New Jersey,
431 U.S. 1 (1977) 10

Wipperfurth v. U-Haul Co. of Western Wis., Inc.,
101 Wis. 2d 586, 304 N.W.2d 767 (1981) 6, 18

WISCONSIN STATUTES

Wis. Stat. § 15.03 5
Wis. Stat. § 15.103(1) 5
Wis. Stat. § 218.01 (1937) 13
Wis. Stat. § 218.01(3)(a)17 ..... 3, 13
Wis. Stat. § 218.01(3)(a)17. (1987-88) 3
Wis. Stat. § 218.01(3)(a)23. (1987-88) 4
Wis. Stat. § 218.01(3)(a)26m. (1987-88) 3, 4
Wis. Stat. § 218.01(3x) ..... passim
Wis. Stat. § 218.01(3x)(b)1 ..... 4, 6
Wis. Stat. § 218.01(3x)(b)2 ..... 4, 5
Wis. Stat. § 218.01(3x)(b)3 ..... 5, 6
Wis. Stat. § 218.01(3x)(c)1.b. 6
Wis. Stat. § 218.01(3x)(c)1.e. 6
Wis. Stat. § 218.01(3x)(c)1.f 6
Wis. Stat. § 218.01(3x)(c)2 5
Wis. Stat. § 218.01(3x)(d) 5
Wis. Stat. § 218.01(9) 4
Wis. Stat. ch. 135 6

OTHER AUTHORITIES

1993 Wisconsin Act 13, sec. 48 4

No. 98-986

In The

Supreme Court of the United States

October Term, 1998

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

KOLOSSO AUTO SALES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION OF *AMICUS CURIAE* THE STATE OF WISCONSIN

Amicus curiae the State of Wisconsin submits this brief in opposition to the petition for a writ of certiorari filed by petitioner DaimlerChrysler Corporation (herein, Chrysler).

STATEMENT

Although petitioner challenged the constitutionality of a statute of the State of Wisconsin (Wis. Stat. § 218.01(3x), applied to existing motor vehicle dealership contracts), neither the state nor any agency or official of the

state was made a party to the district court proceedings. However, the State of Wisconsin appeared as *amicus curiae* in both the district court and the court of appeals.

The state would make the following additions and corrections to Chrysler's statement of the case.

A. Degree of Impairment Resulting from the State's Enactment of a Law Which "regularized a gray area in the [prior] dealership law by creating a specific procedure for resolving disputes over dealers' requests to relocate." Pet-Ap. 9a.

The record did not establish that the terms of the dealership agreement concerning the location of respondent's ("Kolosso's") dealership were "[i]n recognition of Chrysler's overriding economic interest in the location of its franchise dealerships," as suggested by petitioner. Pet. at 3. The dealership agreement appeared to be a standard form agreement. It ostensibly did not have a termination date and ostensibly granted Chrysler the unilateral right to modify its terms. The record did not establish how any particular term of the agreement would have been interpreted or enforced by Wisconsin courts, in the absence of the challenged statutory provision. Nevertheless, the court of appeals concluded that the application of Wis. Stat. § 218.01(3x) to existing dealership agreements represented "a real change," Pet-Ap. 9a, which "changed the dealership contract to Chrysler's disadvantage." *Id.* at 5a. The court stated it had "no reason to doubt Chrysler's claim that the change hurt it," *id.* at 9a, perceiving the "[t]he result [to] be an added expense to Chrysler--either the loss of car sales by reason of the relocation or the expense of paying Kolosso not to move." *Id.* at 5a.

Contrary to Chrysler's statement in the petition, it is not correct that "[a]t the time that Chrysler executed its franchise agreement with Kolosso, Wisconsin had no statutes

or regulations governing whether or where automobile dealers could relocate." *See* Pet. at 3. As the court of appeals recognized, Wisconsin's long-standing regulation of motor vehicle dealer contracts included a prohibition against the termination of a dealership "unfairly, without due regard to the equities or without just provocation." *See* Pet-Ap. 7a, quoting Wis. Stat. § 218.01(3)(a)17. Accordingly, if, prior to the enactment of Wis. Stat. § 218.01(3x), a manufacturer sought to terminate (or enjoin) a dealer attempting to relocate without prior approval, its actions would be subject to existing regulation. *See id.* 8a. Moreover, the law at the time of Kolosso's contracting with Chrysler extended to both direct and indirect terminations. Wis. Stat. § 218.01(3)(a)17. (1987-88). It would not have been outside the realm of possibility for a dealer to argue that the denial of a request to relocate constituted an indirect termination. In addition, the dispute between Kolosso and Chrysler concerned Kolosso's request to move in order to combine its Chrysler facilities with an existing Toyota dealership. Prior to Kolosso's entering into its dealership agreement with Chrysler, the Wisconsin Legislature added a provision to the state's motor vehicle dealership law that prohibited manufacturers from "unreasonably refus[ing] to allow a dealership to share its facilities with another . . . ." Wis. Stat. § 218.01(3)(a)26m. (1987-88). The court of appeals was correct in described Wisconsin's regulation of dealership location requests prior to the enactment of Wis. Stat. § 218.01(3x) as a "gray area in the dealership law." Pet-Ap. 9a, 11a.

The purpose of applying Wis. Stat. § 218.01(3x) to existing motor vehicle dealership contracts was broader than suggested in the third paragraph of the petition. Chrysler states that the object of the law was "to address the issue of dealership relocation." *See* Pet. at 3. In point of fact, the law established an administrative procedure for resolving dealership disputes not involving direct terminations but likely to have a substantial economic impact on a dealership. In addition to disputes concerning dealer location, the new

law established the same administrative procedure for resolving disputes concerning a change in a dealership's ownership or executive management, a transfer of a dealership's assets to another person or the addition of another franchise at an existing franchise's location, where any of these proposed actions required the manufacturer's prior approval under the terms of the dealership agreement. Wis. Stat. § 218.01(3x)(b)1.

These types of dealership disputes were already subject to Wisconsin's motor vehicle dealers law at the time of Wis. Stat. § 218.01(3x)'s enactment. *See* Wis. Stat. § 218.01(3)(a)23. and 26m. (1987-88) (prohibiting manufacturers from unreasonably refusing to allow changes in dealership ownership or executive management, and from unreasonably refusing to allow dealers to share their facilities). But the procedure for enforcing the earlier provisions had been awkward, subjecting the manufacturer to possible license revocation proceedings, Wis. Stat. § 218.01(3)(a), and/or treble damages in a private civil action brought by the dealer. Wis. Stat. § 218.01(9).

Consistent with the state's prior regulation of similar types of dealership disputes and the fact that relocation disputes constituted "a gray area of the dealership law," Pet-Ap. 9a, 11a., 1993 Wisconsin Act 13, sec. 48 made the new procedure established in Wis. Stat. § 218.01(3x) applicable to existing dealership contracts.

The new procedure does not permit a dealer to bypass a franchise agreement's requirement of requesting approval to take any of the proposed actions. Rather, the statute comes into play only upon the dealer's providing written notice of the proposed action to both the manufacturer and the Wisconsin Department of Transportation. Wis. Stat. § 218.01(3x)(b)1. If the request is denied, the law requires the manufacturer to provide a written statement explaining its reasons for denying the request. Wis. Stat. § 218.01(3x)(b)2. The manufacturer's

filing of its statement of reasons has the legal effect of prohibiting the dealer from undertaking the proposed action "unless it receives an order permitting it to do so from the division of hearings and appeals under par. (c)2." *Id.* Certain grounds for denial are exempted from the statutory procedure altogether. Wis. Stat. § 218.01(3x)(d). The manufacturer's written statement is not provided to the Wisconsin Division of Hearings and Appeals, as Chrysler writes (Pet. at 4), but to the dealer and to the state transportation department, which licenses dealers and manufacturers. Wis. Stat. § 218.01(3x)(b)2. Further state involvement occurs only if the dealer files a complaint for determination of good cause for permitting the proposed action. Wis. Stat. § 218.01(3x)(b)3. No state investigation or enforcement action is triggered by the filing of a complaint. Rather, the Wisconsin Division of Hearings and Appeals, through an administrative law judge, is to "promptly schedule a hearing and decide the matter," Wis. Stat. § 218.01(3x)(b)3., with the parties responsible for discovering and presenting relevant evidence.[1] As previously noted, a dealer may not undertake the proposed action unless an order finding good cause has been entered. Wis. Stat. § 218.01(3x)(b)2. A dealer is also prohibited from taking the proposed action "pending the determination of the matter." Wis. Stat. § 218.01(3x)(b)3. Finally, if good cause is found for permitting the dealer's proposed action, the administrative law judge's order may require the fulfillment of appropriate conditions both before and after the proposed action is undertaken. Wis. Stat. § 218.01(3x)(c)2.

The court of appeals' decision suggests that the manufacturer is required to demonstrate "good cause" for denying a relocation request. *See* Pet-Ap. 3a (referring to

---

[1] Under the state's motor vehicle dealer law, and under Wisconsin law generally, see Wis. Stat. §§ 15.03, 15.103(1), the Wisconsin Division of Hearings and Appeals serves solely in an adjudicative capacity, having no independent regulatory function or authority.

possibility of Chrysler's "persuad[ing] the agency that administers the dealership law that it has good cause to forbid this dealer to relocate"). This part of its decision is incorrect. The statute places the burden on the dealer complaining of the manufacturer's denial to demonstrate "good cause for permitting the proposed action," Wis. Stat. § 218.01(3x)(b)3., the "proposed action" referring to the action being proposed by the dealer. Wis. Stat. § 218.01(3x)(b)1. Chrysler's statement that in making this determination, the Division of Hearings and Appeals "is not even required to consider . . . the economic reasonableness of the manufacturer's business decision" represents an unfounded reading of the law. Pet. at 4. Wisconsin Stat. § 218.01(3x)(c)1.b., e. & f. expressly provide that the Division may consider the manufacturer's reasons for not approving the proposed action, the degree to which the proposed action will interfere with the orderly and profitable distribution of the manufacturer's products and the impact of the proposed action on other dealers. The only reason the state can imagine for the Division's not considering these factors would be if neither party to the administrative proceeding presented argument or evidence concerning them.

The state believes Chrysler is correct that aside from the amendment to Wisconsin's motor vehicle dealership law at issue in this case, the only other Wisconsin statute which applied existing dealership contracts was the Wisconsin Fair Dealership Law, Wis. Stat. ch. 135. Chrysler is correct that the application of the Wisconsin Fair Dealership Law to existing contracts was held unconstitutional by the Wisconsin Supreme Court in *Wipperfurth v. U-Haul Co. of Western Wis., Inc.*, 101 Wis. 2d 586, 304 N.W.2d 767 (1981). *Cf.* Pet. at 3-4. In contrast to Wis. Stat. § 218.01(3x), however, there was no significant prior state regulation of the franchise agreements covered by the Wisconsin Fair Dealership Law. The application of the extensive redefinition of rights under the law to existing (non-motor vehicle) dealer agreements could not be regarded as incremental.

B. Kolosso's Relocation Request.

The record did not establish Chrysler's statement that it denied its dealer's request "because Kolosso's original location was extremely advantageous for the sale of Jeep and Eagle vehicles." *Cf.* Pet. at 5. The record established that reasons similar to those stated in the petition were given by Chrysler in denying Kolosso's request. No factual determination was made whether Chrysler's reasons were in any way pretextual or, if sincerely held, exaggerated to any degree.

C. The District Court Action.

The state would note that the magistrate judge's recommendation to abstain was based on Chrysler's seeking to prevent Kolosso from prosecuting its administrative complaint before the Wisconsin Division of Hearings and Appeals based on a state law argument concerning agency jurisdiction. *See* Pet. at 6, Pet-Ap. 21a n.2; 35a-36a, 40a. This ground for abstention was removed by Chrysler's abandoning its state law objection in subsequent proceedings. *See id.* 14a.

It should also be noted that Chrysler's district court action was in all material respects a facial challenge to the application of Wis. Stat. § 218.01(3x) to existing motor vehicle dealership contracts. The actual application of the statute to Chrysler's relocation request remains conjectural, since no hearing by the Wisconsin Division of Hearings and Appeals has taken place, pending outcome of Chrysler's federal case.

D. The Seventh Circuit's Decision.

The state disagrees with several parts of Chrysler's summary of the Seventh Circuit's decision. Because this disagreement is set out in our statement of reasons for denying the petition, it is not repeated here.

REASONS FOR DENYING THE PETITION

The questions presented by the petition are not framed by the Seventh Circuit's decision. The court of appeals had before it a state law which "in effect regularized a gray area in [Wisconsin's motor vehicle] dealership law by creating a specific procedure for resolving disputes over dealers' requests to relocate." Pet-Ap. 9a. The new law's incremental clarification and procedural simplification of what had formerly been a grey area of the law meant that the impairment was not substantial. Moreover, this incremental clarification and procedural simplification constituted an important public purpose of the law. The Seventh Circuit's decision is properly regarded as an example of a case-specific analysis of economic interests and expectations in the context of contractual relations already subject to extensive state regulation.

The decision of the court of appeals is therefore not in conflict with either this Court's precedents or the decisions of other circuits. It does not establish any new framework for analysis or purport to make new law. The particularized nature of its decision limits its application to other cases. Chrysler's concerns about the impact of the decision on national distribution systems are exaggerated.

I. EVEN IF THE SEVENTH CIRCUIT'S DECISION IS READ AS HOLDING "THAT A STATE MAY FREELY IMPAIR A CONTRACT WITH *NO* PUBLIC JUSTIFICATION, SO LONG AS THE IMPAIRMENT IS 'SMALL,'" PET. AT (I), THAT HOLDING WOULD BE CONSISENT WITH THIS COURT'S INTERPRETATION OF THE CONTRACT CLAUSE.

As argued in the next section, the State of Wisconsin does not believe Chrysler has fairly or accurately summarized the Seventh Circuit's decision. The court of appeals correctly determined that the challenged state law "regularized a gray area in the dealership law by creating a specific procedure for resolving disputes over dealers' requests to relocate." Pet-Ap. 9a. The court of appeals' decision is properly regarded as a thoughtful application of this Court's statement in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978), that "[t]he severity of the impairment measures the height of the hurdle the state legislation must clear." The challenged law was properly upheld because it effected an incremental and clarifying change in state law, with respect to a category of contractual relations which had been subject to substantial state regulation for many years prior to Chrysler's dealership agreement.

At the same time, the court of appeals also stated that "little, predictable impairments—the ones that take only small steps along a path that was discernible when the original contract was signed—don't have to be justified at all . . . ." Pet-Ap. 10a. To the extent its decision is read as resting on this statement of general principle, the statement is entirely consistent with this Court's interpretation of the contract clause.

Where a state statute is claimed to impair the contractual obligations of private parties (as opposed to the obligations of the state itself, *cf. United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977)), a three-prong test is used to determine whether the challenged statute violates the Contract Clause:

> The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship."
>
> . . . .
>
> If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation . . . .
>
> Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." *United States Trust Co.*, 431 U.S., at 22, 97 S. Ct., at 1518. Unless the State itself is a contracting party, see *id.*, at 23, 97 S. Ct., at 1518, "[a]s is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.*, at 22-23, 97 S. Ct., at 1518.

Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411-13 (1983) (citations and footnotes omitted).

This statement plainly implies that "a significant and legitimate public purpose behind the regulation" is required to be shown only after "the threshold inquiry" has been made as to "'whether the state law has, in fact, operated as a

substantial impairment of a contractual relationship.'" This was stated explicitly in *Allied Structural Steel*:

> The severity of the impairment measures the height of the hurdle the state legislation must clear. *Minimal alteration of contractual obligations may end the inquiry at its first stage.* Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

438 U.S. at 245 (emphasis added) (footnote omitted).

"[W]hether the industry the complaining party has entered has been regulated in the past," *Energy Reserves Group, Inc.*, 459 U.S. at 411, is relevant to determining the degree of impairment. *See also Allied Structural Steel Co.* (stating relevant inquiry to be whether challenged state legislation operates "in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken," or whether it "invaded an area never before subject to regulation by the State.") *Id.*, 438 U.S. at 250.

Accordingly, even if Chrysler's reading of the Seventh Circuit's decision were correct, as holding that "Wisconsin's 'small' impairment of Chrysler's contract 'do[es]n't have to be justified at all' by a public purpose," Pet. at 9, quoting Pet-Ap. 10a, that holding would not represent a departure from precedent or the development of any new interpretive framework warranting review.

II. THE FIRST QUESTION PRESENTED BY THE PETITION IS NOT FRAMED BY THE SEVENTH CIRCUIT'S DECISION.

The petition is based on a simplified reading of the Seventh Circuit's decision. It therefore fails to present a significant question concerning the interpretation of the contracts clause.

According to Chrysler, the central holding of the court of appeals was that "a state may freely impair a contract with *no* public justification, so long as the impairment is 'small.'" Pet. at (I). In the petition's statement of the case, Chrysler describes the court of appeals as having "determined that, since Wisconsin had previously enacted *prospective* legislation preventing franchise *termination* except for good cause, Chrysler should have expected *retroactive* legislation preventing dealer *relocation* in the absence of good cause." Pet. at 8. Neither assertion accurately summarizes the court of appeals' decision.

In determining the degree of impairment of Chrysler's contract rights, the court of appeals relied on precedent that emphasized "the degree to which the activity to which the contract pertains was already heavily regulated when the contract was made." Pet-Ap 6a. After reviewing the extent of existing state regulation and assessing the nature of the challenged law, the Seventh Circuit stated that "[t]he little, predictable impairments--the ones that take only small steps along a path that was discernible when the original contract was signed--don't have to be justified as all." Pet-Ap. 10a.

Standing alone, this statement is not a sufficient summary of the Seventh Circuit's reasoning or holding. The statement comes towards the end of the decision, where the court sides with Chrysler, expressing incredulity towards Wisconsin's need to protect motor vehicle dealers from the economic domination of manufacturers. A much better

single-sentence summary of the court of appeals' reasoning is found in the next paragraph of the decision, where the court writes:

> Chrysler should have known in 1988 [when it entered into the dealership agreement with Kolosso] that it did not have a solid right to prevent a dealer from changing the location of the dealership, that it was operating in a grey area of the dealership law, that the law might some day be amended to regulate disputes over relocation specifically, and that if this happened it might not be able to get the amendment struck down under the contracts clause.

Pet-Ap. 10a-11a. This conclusion was not only correct, but represented the outcome of the court's making a "judgment[] of degree" concerning the foreseeability of the impairment. *Id.* at 7a. The court of appeals' decision exemplifies the type of careful analysis appropriate to a case where a duly enacted state statute is being challenged as violative of contract clause principles. The Seventh Circuit's decision represents a reasoned application of this Court's precedent to a particular state regulatory regime and a specific private contractual relation. It does not give rise to the first question presented in the petition.

As the court of appeals noted, the automobile dealership relationship has been heavily regulated in Wisconsin for more than six decades. Pet-Ap. 6a, citing Wis. Stat. § 218.01 (1937). Statutory language in existence before Chrysler's dealership agreement with Kolosso proscribed the termination of a dealership "unfairly, without due regard to the equities or without just provocation." Pet-Ap. 7a, citing Wis. Stat. § 218.01(3)(a)17. This language has been interpreted to forbid termination without good cause. *See* Pet-Ap. 7a, citing *Nagle Motors v. Volkswagen N. C. Distributor*, 51 Wis. 2d 413, 187 N.W.2d 374, 385 (1971); *Kuhl Motor Co. v. Ford Motor Co.*, 270 Wis. 488, 71

N.W.2d 420, 426 (1955), *reh'g granted*, 270 Wis. at 503a-03b, 71 N.W.2d at 428.

At the beginning of its decision, the court of appeals commented that Wisconsin's Motor Vehicle Dealers Law did not "*expressly* limit an auto manufacturer's right to" require a dealer to obtain the manufacturer's prior approval before relocating its facilities. Pet-Ap. 1a (emphasis added). But the absence of express limitation did not mean that the exercise of a manufacturer's right to approve or disapprove a request to relocate had been unregulated. As the court of appeals noted,

> Although the law did not contain a specific provision dealing with relocation other than one allowing a dealer to complain if another dealer relocated into his area, the law's curtailment of the manufacturer's right of termination cast a cloud over *all* contractual clauses restricting a dealer's freedom of action, any one of which might be challenged in application as unfair, inequitable, unprovoked, or, in short, as not being based on good cause.

Id. at 7a. The court explained that prior statutory restrictions would be implicated at least in a case where a dealer attempted to relocate without obtaining the manufacturer's consent and the manufacturer either sought to terminate the dealer or to enjoin an alleged breach of contract. *Id.* at 8a.

In arguing that the challenged statute was devoid of public purpose, Chrysler relies on the court of appeals' statement that the justifications offered by the state's lawyers

were hard to take seriously. Pet-Ap 10a.[2] But the court itself articulated an important purpose of the law. The court of appeals wrote:

> The 1993 amendment in effect regularized a gray area in the dealership law by creating a specific procedure for resolving disputes over dealers' requests to relocate. Before then, as we have said, such disputes were likely to be resolved under a similarly vague substantive standard, only in the context of a termination. The change was thus largely procedural.

Pet-Ap. 9a.

Accordingly, the statute has the public purpose of providing a specific procedure for resolving disputes over dealers' requests to relocate, clarifying what had formerly been a "gray area in the dealership law."

That this was as much the law's purpose as the redress of disparities in economic power is evident from the administrative procedure created and by the law's coverage of similar types of termination disputes.

---

[2] It is clear from the remainder of the Court's statement that the reference is to the argument that the law seeks to redress an imbalance in bargaining strength and economic power between automobile manufacturers and their dealers. *See* Pet-Ap. 10a. While the court of appeals was not particularly moved by these concerns, it is also clear that they have been recognized as an important public justification for a state's replacing a system of private governance for this species of contractual relationship by one in which significant aspects of the relationship are legislatively defined. *See, e.g., New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 100-01 (1978) ("[t]he disparity in bargaining power between automobile manufacturers and their dealers prompted Congress and some 25 States to enact legislation to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers"); *Forest Home Dodge, Inc., v. Karns*, 29 Wis. 2d 78, 85, 138 N.W.2d 214 (1965) (referring to law's "recognition of the gross disparity of bargaining power between the manufacturer of automobiles and the local retailer" and "the long history of the abuse of dealers by manufacturers").

As explained in Section A of the state's statement of the case (*supra* at 2-5), the specific procedure places relocation and similar disagreements arising out of the automobile franchise relationship before a neutral administrative tribunal. This provides an adjudicative forum that is alternative to the state's trial courts. This will permit the development of a cohesive body of interpretative decisions by the tribunal responsible for deciding other dealership cases.[3] The resolution of disputes is likely to be more streamlined and cost effective than conventional litigation. The law also seeks to confine dealer/manufacturer relocation disputes, rather than allowing them to escalate until a dealer decides to move unilaterally and/or a manufacturer invokes its powers of termination.

In creating Wis. Stat. § 218.01(3x), the Wisconsin Legislature made several other non-termination controversies subject to the same procedure. These provisions could not be regarded as substantive impairments of existing contracts, since the other areas of dealer disputes had previously been subject to regulation, but under a more awkward procedure requiring suspension or revocation of the manufacturer's state license and/or a civil action for treble damages brought by the affected dealer. This fact best explains the law's being made applicable to existing contracts. Most of the aspects of existing contracts subject to the new procedure were already subject to express regulation prior to the law's enactment, while relocation disputes operated within a grey area of the existing dealership law.

---

[3] The Wisconsin Division of Hearings and Appeals is the successor agency to the former Wisconsin Office of the Commissioner of Transportation, which previously heard motor vehicle dealership disputes.

III. THE SEVENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS. MOREOVER, PETITIONER'S PERCEPTION OF THE IMPACT OF THE DECISION IS EXAGGERATED.

The court of appeals' decision involved the court's exercising its "best judgment," Pet-Ap. 7a, regarding the foreseeability, and therefore the degree, of impairment, in light of prior state regulation of the motor vehicle dealer relationship. Given its particularized inquiry, and the appropriateness of such an analysis under contract clause precedent, it is not surprising that the Seventh Circuit's decision does not conflict with decisions of other circuits.

Petitioner's reference to the court of appeals' adopting a minority position, *see* Pet. at 19, is not accurate. The application of a flexible constitutional standard to a specific contractual relationship within the context of a specific state regulatory system is likely to produce cases both permitting and disallowing new regulatory enactments. That different results are reached in particular cases does not demonstrate a split concerning governing legal standards.

The principal circuit decision that Chrysler identifies as in conflict with the Seventh Circuit's decision is *Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3d 383 (8th Cir. 1994). In assessing the claimed conflict, it is important to recognize that the case did not involve an incremental extension of already substantial state regulation to an area of contract disputes "operating in a grey area of the dealership law . . . ." Pet-Ap. 11a. *Holiday Inns Franchising, Inc.* involved the enactment and retrospective application of an Iowa law regulating the transfer and termination of food service and hotel franchises. These types of franchises were not previously subject to significant state regulation. *See McDonald's Corp. v. Nelson*, 822 F. Supp. 597 (S.D. Iowa

1993), *aff'd sub nom. Holiday Inns Franchising v. Branstad*, 29 F.3d 383 (8th Cir. 1994). The Eighth Circuit began its brief decision by emphasizing that "in determining whether an impairment is substantial, and thus unconstitutional, a court should take into account whether the kind of contract or relationship that furnishes the subject matter of the dispute had previously been the subject of regulation." *Holiday Inns Franchising*, 29 F.3d at 384. Accordingly, the Eighth Circuit's reference to "the retrospective application of statutes similar to the one here, and in the circumstances that are present in this case, ha[ving] almost uniformly been held unconstitutional," *id.* at 385, did not extend to the kind of incremental law considered by the Seventh Circuit. The same is true of the decision of the Wisconsin Supreme Court in *Wipperfurth* which petitioner points to as establishing the supposed non-foreseeability of small changes in Wisconsin's existing system of regulation. In *Wipperfurth*, the Wisconsin Supreme Court struck down the retrospective application of the Wisconsin Fair Dealership Law. The law, not applicable to motor vehicle dealerships, created a comprehensive redefinition of the rights of franchisors and franchisees. Prior to the law's enactment, the franchise relationship was largely free from state regulation.

Finally, Chrysler claims that the Seventh Circuit's decision will undermine the ability of national companies to distribute their goods. Its concerns are exaggerated. First, whatever impact the law might have, there is no contention that Wisconsin may not apply the law to newly-entered dealership agreements. Second, the Seventh Circuit's application of a flexible constitutional standard to the specific contractual relationship within the context of the specific state regulatory system is not likely to have a very general reach. The court did not purport to state a new legal standard and, in point of fact, it did not. Third, the Wisconsin Division of Hearings and Appeals has not yet had an opportunity to hear the administrative complaint. Without knowing the strength of Chrysler's interests in preventing

relocation, or Kolosso's in moving, it can hardly be assumed that the Division will uphold the dealer's complaint. Finally, as the court of appeals noted, the contracts clause will continue to restrain the application of Wis. Stat. § 218.01(3x) to Chrysler's dispute. *See* Pet-Ap. 11a.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully Submitted,

JAMES E. DOYLE
Attorney General

PETER C. ANDERSON*
Assistant Attorney General
State Bar #1009845

Attorneys for *Amicus curiae*
State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9595

*Counsel of Record

January 1999